LIBRARY
SUPREME COURT, U. S.

No. 73-535

FILED
NOV 30 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANCIS R. SALAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-535

FRANCIS R. SALAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entitled to a new trial based on newly discovered evidence.

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted with others on one count of having misapplied funds of a federally insured bank and one count of conspiracy to do so, in violation of 18 U.S.C. 371 and 656. He was sentenced to concurrent terms of imprisonment for three years on each count. Petitioner was also fined $2,000 on each count. The court of appeals affirmed. *United States* v. *Cooper, et al.*, 464 F. 2d 648 (C.A. 10), certiorari denied, 409 U.S. 1107. Petitioner then filed a motion for a new trial, which was denied by the district court. The court of appeals affirmed the denial of the motion (Pet. App. A1-A3).

The evidence showed that petitioner and co-conspirators Donald Cooper, Delmar Cooper, and Paul Cooper were officers and directors of the now defunct Rocky Mountain Bank of Lakewood, Colorado. Together with co-conspirator Allen R. Hurt, petitioner dominated the board of directors of the bank and the bank's loan and discount committee. They misapplied the monies of Rocky Mountain Bank by making loans for their benefit through straw men or through corporations which they owned or were in the process of acquiring, without disclosing their interest in the loans.[1]

More specifically, in February 1966 petitioner induced Harvey Alpert and Michael Cooper to act as straw men in obtaining a $65,000 loan from the bank. The $65,000 was initially given to Donald and Delmar Cooper, who served on the loan committee and who gave Alpert and Michael Cooper a note guaranteeing repayment. Neither Alpert nor Michael Cooper received any proceeds from the loan. The loan papers indicated the money was for "new business in the construction field," but petitioner deposited the funds in his trustee account at another bank and gave $55,000 of this money to the Denver Revival Tabernacle, a Cooper brothers enterprise,[2] to pay off an overdue Tabernacle loan made by another bank. Of the remaining $10,000, petitioner deposited $3,000 in his personal account, took $5,000 in cash, and used $650 to replace a previously drawn check.

---

[1] The Rocky Mountain Bank was closed on January 30, 1969, by state banking authorities (T. 1053).

[2] Donald, Delmar and Paul Cooper were directors of the Tabernacle.

The Alpert-Cooper loan was later repaid by a $5,000 Westland Industrial Bank money order drawn on Westland's account,[3] a $5,000 renewal by Alpert and Michael Cooper, and a $55,000 payment by Paul Cooper out of the proceeds of another loan made to him by the Rocky Mountain Bank. The $5,000 renewal was eventually paid by petitioner[4] (T. 140, 148-151, 220-246, 355-400, 582-583, 666-698, 806-807, 1423-1427, 1465, 1477).[5]

The evidence further showed a series of other loans to or for the benefit of petitioner made by the bank in October 1965,[6] in July and September 1966, and in April 1967 (Tr. 232-234, 700-702, 750-753, 1338-1346, 1477-1483, 1775, 1781, 1786).

In December 1968, knowing that the bank might be sold and that it was in danger of being closed, petitioner, together with the other bank directors, transferred the real property of the Denver Revival Tabernacle to the bank, in satisfaction of a $275,000 balance owing on loans

---

[3] Until May 1969, the Westland Industrial Bank was controlled by the directors of the Rocky Mountain Bank who were involved in this scheme.

[4] The renewal was also made as a personal favor to petitioner by the Coopers. Alpert and Michael Cooper made no payments on the renewal.

[5] "T." refers to the trial transcript, a copy of which is being lodged with the Clerk.

[6] These loans, made to Paul Cooper and others, were to enable petitioner, Donald Cooper and Delmar Cooper to purchase a beer and liquor distributorship in Safford, Arizona (T. 97-100, 109-122, 152-156, 159-170, 180, 182, 210-213, 224-225, 1452-1457, 1459-1460, 1747, 1803, 1969-1970, 2054, 2060-2061, 2063, 2065-2066).

made by the bank to Paul Cooper,[7] Donald Cooper's wife, the Denver Revival Tabernacle, Westland Industrial Bank, and Motels, Inc., another Cooper enterprise. The fair market value of the property was approximately $105,000 (T. 519-523, 526-527, 537, 971, 978-981, 1079-1083, 1179, 1524).

1. Petitioner contends that he should be granted a new trial because evidence in a civil suit tried after his conviction showed that despite the various transactions described above there would likely be no loss to stockholders or depositors in the liquidation of the Rocky Mountain Bank (Pet. 7-17). This argument, however, was considered and properly rejected by the court of appeals, on whose opinion we rely (Pet. App. A1-A3). We note additionally that, contrary to petitioner's allegation, the decision of the Tenth Circuit in this case—holding that proof of actual loss is not a necessary element of the offense of willful misapplication of bank funds—accords with those of other circuits. See *United States* v. *Acree*, 466 F. 2d 1114, 1117-1118 (C.A. 10), certiorari denied, 410 U.S. 913; *United States* v. *Rickert*, 459 F. 2d 352 (C.A. 5); *United States* v. *Fortunato*, 402 F. 2d 79, 81 (C.A. 2), certiorari denied, 394 U.S. 933; *Golden* v. *United States*, 318 F. 2d 357, 361 (C.A. 1); *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4), certiorari denied, 335 U.S. 826, all of which hold that actual loss is not an element of the offense of willful misapplication of bank funds. The pertinent words of 18 U.S.C. 656 are "willfully misapplies." Although some courts have construed the statute as containing a requirement of an intent to

---

[7] This loan had been used to repay the balance on the Alpert-Cooper note.

injure or defraud the bank, *United States* v. *Fortunato, supra,* 402 F. 2d at 80, proof that the bank actually suffered loss bears no relation to the prophylactic purpose of the statute (see cases cited above).

2. Petitioner contends that since the government had introduced evidence at trial showing that the Rocky Mountain Bank had suffered financial loss, when in fact it had not, it was a violation of his Fifth Amendment right to due process for the trial court to deny his motion for a new trial. Although he makes no reference to the record, petitioner is presumably referring to evidence which tended to show that the fair market value of the Denver Revival Tabernacle's property was far below that of the items for which it was exchanged by the Rocky Mountain Bank. As petitioner himself contended in closing argument, however, no *actual* loss to the Rocky Mountain Bank was ever shown (T. 2546). Moreover, the judge properly instructed the jury as follows (T. 2589-2590):

> Wilful misapplication has no technical meaning. It is not synonymous with larceny or embezzlement. It is to be accepted in its popular sense and simply means the misapplication knowingly and wilfully of the funds of the bank for the use, benefit or gain of some person other than the bank, and it must appear further that such misapplication was with intent either to injure or defraud the bank.
>
> To further define the word misapplication or the term, it means the unlawful taking or conversion by a person to his own use or the use of someone else of the money and funds of an insured bank.
>
> Misapplication under this statute with which we are concerned may be committed in either of the

following ways: First, by an officer or director of an insured bank causing a loan to be made for his own benefit and concealing his interest in the loan from the bank, or secondly, by an officer or director of the bank causing a loan to be made and knowingly concealing from the bank the identity of the true borrower.

If an intent to injure or defraud an insured bank when a loan is made is shown, it matters not whether the bank will lose any part of the money. It is the unlawful intent to injure or defraud that is the essence of this offense.

To act with intent to defraud means to act wilfully and with a specific intent to deceive or to cheat, ordinarily for the purpose of either causing some financial loss to another or bringing financial gain to one's self. However, as I have told you, the evidence in the case need not establish that the United States or any other person was actually defrauded, but only that the accused acted with intent to defraud.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

---

[8] Petitioner objected to this instruction (T. 2612), but, as has already been discussed, *supra*, there was no need for an actual loss to the bank to be proven to sustain petitioner's conviction.